



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**FSD No. 203 of 2020(NSJ)**

**BETWEEN:**

**ABDULHAMEED DHIA JAFAR**

**Plaintiff**

**AND**

**(1) ABRAAJ HOLDINGS**  
(in official liquidation)

**(2) GHF GENERAL PARTNER LIMITED**  
(in its capacity as general partner of GHF Fund LP (formerly Abraaj Growth Markets Health Fund LP) and GHF Fund (B) LP (formerly Abraaj Growth Markets Health Fund (B) LP))

**(3) THE GHF GROUP LIMITED**  
(formerly The Abraaj Healthcare Group Limited)

**(4) ABRAAJ GENERAL PARTNER VIII LIMITED**  
(in its capacity as general partner of Neoma Private Equity Fund IV LP (formerly known as Abraaj Private Equity Fund IV LP))

**Defendants**

**Before:** **The Hon. Mr Justice Segal**

**Method of disposal:** **On the papers**

**Draft judgment circulated:** **14 May 2024**

**Judgment handed down:** **21 May 2024**

**JUDGMENT ON THE FUND PARTIES' APPLICATION RELATING TO THE  
PAYMENT OF THE HARD COPY BUNDLE COSTS**

**The Application and the nature of the relief sought by the Fund Parties**

1. This is my judgment on the application (the *Application*) by the Second, Third and Fourth Defendants (the *Fund Parties*) made by a letter to the Court dated 1 March 2024 (the *1 March Letter*) from Walkers (the attorneys for the Second and Third Defendants) on behalf of the Fund Parties. The letter attached a draft order, which the Fund Parties wish the Court to make.
2. In the Application the Fund Parties seek an order that the Plaintiff be required to pay a share of the time costs and the disbursements incurred by the Fund Parties' legal advisers in preparing immediately after the opening of the trial in these proceedings a hard copy of the trial bundle. In particular, the Fund Parties seek an order that the Plaintiff pay the Second and Third Defendants (the *GHF Parties*) US\$79,172.72 and the Fourth Defendant (*Fund IV*) US\$20,213.25. The Fund Parties also seek an order that the Plaintiff pay their costs of seeking this contribution from the Plaintiff from 11 December 2023 and that they have liberty to apply for an award for a payment on account of these costs.
3. The Fund Parties accept that any order made on their Application which requires the Plaintiff to pay these sums will not result in a final determination of the liability to pay the costs associated with the preparation of the hard copy hearing bundle. The Fund Parties say that any order and any payment made by the Plaintiff pursuant to such an order will be without prejudice to all parties' rights to seek further costs orders relating to the hard copy bundles following the determination of the proceedings and would not alter the usual taxation of costs process. Accordingly, for example: (a) if the Plaintiff is ultimately successful and the Fund Parties are ordered to pay some or all of his costs the amounts paid pursuant to the order which the Fund Parties now seek would be repayable; and (b) if the Fund Parties are successful, and a costs order is made in their favour, they would be at liberty to seek a payment of a higher amount of these costs on a taxation. The Fund Parties submit that they are entitled to, and that it is appropriate for the Court to make, such an order because they should not, in the circumstances, be

out of pocket and have to await the outcome of the proceedings and a taxation before being reimbursed for the substantial costs they were required to incur in taking action (preparing and having available in Court the relevant hard copies) which the Plaintiff was obliged to take under the directions order dated 18 August 2022 (the *Directions Order*) and the amended directions order dated 25 August 2023 (the *Amended Directions Order*).

4. The Plaintiff opposes the Application and invites the Court to dismiss it and award him his costs of responding to it, to be taxed on the standard basis if not agreed. It appears that the Plaintiff does not object to an order being made, and indeed considers that any order should be made, on the basis proposed by the Fund Parties (namely that it will be without prejudice to all parties' rights to seek further costs orders relating to the hard copy bundles following the determination of the proceedings and would not alter the usual taxation of costs process).

### **The background**

5. I summarise below the circumstances giving rise to the Application and provide extracts from the email correspondence between Walkers and Forbes Hare, which sets out the parties' positions.
6. On day two of the trial (7 November 2023), the Plaintiff's Leading Counsel, Lord Falconer, raised what he referred to as a housekeeping issue with the Court. He said that he considered that it would be helpful if, and only fair to the Plaintiff that, hard copies of the documents to be put to him in cross-examination were available in Court so that they could be handed up to him, and that, as a practical matter, it would be for the Fund Parties' attorneys to have such copies available in Court when the Plaintiff came to be cross-examined.
7. I regarded it as surprising that this issue had not been resolved by agreement before the start of the trial but indicated that it seemed to me to be important that the Plaintiff did have hard copy documents available to him if that is what he felt to be necessary and that there would be no improper procedural or tactical advantage given to the Plaintiff's legal team if the documents that were to be, or might be, put to the Plaintiff were not

disclosed to the Plaintiff in advance but held by the Fund Parties' legal team in Court, so that the relevant document could be handed up to the Plaintiff when referred to by the Fund Parties' counsel or when the Plaintiff asked to see it. Leading Counsel for the Fund Parties confirmed that in view of this, their instructing attorneys would arrange for the relevant hard copies to be available in Court. There was no discussion of the costs involved in this exercise.

8. It appears, but Lord Falconer did not mention (he may not have known, as apparently Leading Counsel for the Fund Parties did not know) that the Plaintiff's Cayman attorneys Forbes Hare had made a similar request to the Fund Parties' attorneys (Walkers and Ogier) by email dated 5 November 2023 (the day before the start of the trial) and the request had been rejected. The Fund Parties say that their reason for doing so was that the request was made very late, having been made on the eve of the trial when they were fully engaged in trial preparation, complying with the request would involve the urgent copying of a large part and possibly the whole of the hearing bundle (comprising many volumes), and therefore a huge, time-consuming and expensive logistical exercise, and that the Plaintiff's last minute request was inconsistent with the position he had previously adopted regarding the need for hard copy documents to be available in Court. Forbes Hare had emailed the Fund Parties' attorneys on 23 July 2023 to say that "*the trial bundle being fully electronic... with the witnesses working off the electronic bundle in the witness box as well.*"
9. As I understand it, Walkers took the view (see [4(v)] of the 1 March Letter) that the request to have available in Court hard copies of the documents that the Plaintiff might wish to see during his cross-examination required them to copy not only those documents that the Fund Parties' counsel intended to put and show to the Plaintiff (which documents had not all been identified at the time) but also other related documents which it might be expected that the Plaintiff would also wish to see. Walkers took the pragmatic decision (again as I understand it) that, in view of the extreme urgency of the request and the time pressure they were working under, and since they already had available, albeit for use by their legal team, an incomplete hard copy hearing bundle, the only pragmatic solution was to use that and have that updated by adding hard copies of the further substantial number of documents that were in the process of being uploaded to the e-bundle. Walkers (and Ogier) were required to devote

substantial resources to this exercise. Walkers say that a team from their firm and Ogier were required to work through the nights of 8 and 9 November to complete the exercise.

10. The Fund Parties requested that the Plaintiff contribute to and pay the majority of the costs of this exercise (emails were initially exchanged during the evening of 8 November). They argued that it had been and remained the Plaintiff's responsibility to produce the hard copy documents needed for the hearing and that the exercise that had been undertaken and the costs incurred were reasonable in the circumstances. When no agreement was reached Ms White of Walkers raised this issue with the Court on day four of the trial (9 November). I indicated that in my view there should be costs sharing but that I wanted the parties to have a further discussion immediately (during the rest of the day) to seek to agree the basis on which the costs would be shared (I did not think that the trial should be disrupted or Court troubled with an issue, which should have been capable of being resolved by agreement if the parties acted reasonably). But I said that I would resolve the issue if agreement could not be reached (either generally or on particular points) and asked to be told what the outstanding issues were.
11. After the hearing on 9 November 2023 there were further discussions by email. Forbes Hare emailed Walkers (at 21.58) to say that (underlining added):

“Although the production of the entire hard copy set appears necessary given the refusal of the Fund Parties to provide copies of the documents that are required for cross examination, Mr Jafar agrees to pay 70% of the reasonable disbursement and attorney costs of producing the hard copy set (so assuming the 35% share of the AH JOLs) as previously offered by you in your email of yesterday. Such costs to ultimately be recoverable from the losing party in the usual way.
12. Walkers and Ogier confirmed the agreement of their clients to these terms by emails on the same evening (Walkers have referred to this arrangement as the **Costs Sharing Agreement**).
13. By the time that the Plaintiff's cross-examination started on 10 November 2023, the exercise was complete and the hard copy documents were used during the cross-examination.

14. On 11 December 2023, Walkers wrote to Forbes Hare and said this:

“3. Following the submissions to the Court on 9 November 2023, we write to inform you that the total cost for preparing the Hard Copy Bundles is US\$186,575.51, which consists of:

<i>Description</i>	<i>Cost</i>
<i>Total Disbursements for Walkers</i>	<i>US\$39,282.01</i>
<i>Total Disbursements for Ogier</i>	<i>US\$1,704.09</i>
<i>Total Walkers' Time Costs</i>	<i>US\$88,723.48</i>
<i>Total Ogier's Time Costs</i>	<i>US\$56,865.93</i>
<i>TOTAL</i> <i>[corrected:US\$185,263.03]</i>	<i>US\$186,575.51</i>

4. Pursuant to the Costs Agreement, the parties' respective shares of the Hard Copy Bundle cost are as follows:

- (i) Mr Jafar: US\$130,602.85 (i.e. 70%)
- (ii) Fund IV: US\$27,986.33 (i.e. 15%)
- (iii) GHF Parties: US\$27,986.33 (i.e. 15%)

5. His Lordship recognised that "[t]he costs are not insignificant, I can understand that". With this in mind and in the spirit of transparency:

- (i) annex 1 to this letter provides a breakdown of the disbursements and time costs for both Walkers and Ogier in preparing the Hard Copy Bundles;
- (ii) annex 2 is a compilation of invoices issued by: (a) London Legal for the printing bundles D1 to D10 in England; (b) DHL, for the couriering of those bundles from England to the Cayman Islands; (c) London Legal regarding the purchase of numbered dividers; (d) Kirk Office Equipment Ltd regarding the purchase of binders in order to update bundle D1; (e) Office Supply Ltd (incurred by Ogier in CIS

*converted to USD at the rate of 0.82) for the purchase of materials for the hard copy bundles, as necessary; and*

*(iii) paragraphs 6 to 12 below provide context to the above referenced invoices and the time costs incurred by the Walkers and Ogier teams.*

- 6. On 26 September 2023, London Legal was instructed to print bundles D1 to D10 (excluding bundle D3). On 9 October 2023, London Legal printed bundle D3.*
- 7. On 25 October 2023, bundles D1 to D10 were couriered from England to the Cayman Islands, arriving at Walkers' office on 27 October 2023. As you will be well aware though, the trial bundle was updated on multiple occasions after this date meaning that the hardcopy bundle that was delivered to Walkers' office on 27 October 2023 was out-of-date by the commencement of the trial.*
- 8. From late September to 7 November 2023, the printing of all other Hard Copy Bundles (including, for example, bundle D11 in A5 size, bundles A to Z and all parties' insertions to those bundles prior to and during trial) was primarily completed by one junior Associate and one Paralegal of this firm, with the assistance of various members of Walkers' secretarial team. Annex 1 lists the fees incurred by Walkers' senior lawyers, who oversaw the printing of the Hard Copy Bundles and inter partes correspondence regarding the same, however, no fees have been charged for our secretarial team's labour.*
- 9. Following your client's last-minute decision to demand that hardcopy bundles be available at the trial (accompanied by your firm's refusal to perform the work itself despite the terms of the Directions Order and Amended Directions Order which provided that your client was responsible for producing the hard copy bundles), Ogier's employees commenced working on the hard copy bundles task on the morning of 8 November 2023 and assisted with the hard copy insertions for Bundle D1 (which ultimately totals 93 volumes excluding overflow bundles). Ogier took responsibility for Bundle D1 Tabs 3500 to the end of the bundle which meant page turning and updating volumes 43 to 93 plus creating another 8 overflow volumes to accommodate all of the parties' additional insertions (as referred to at paragraph 12 below). Ogier also prepared hard copies of Bundles B and S, as well as Bundle D11 (all of which were utilised by your witnesses). Given the extremely limited time available (less than 72 hours) before Mr Jafar was to commence giving his evidence, and the lack of a commercial legal bundle printing service in the Cayman Islands, the Ogier team was composed of a range of fee-earners as set out in Annex 1, page 3 (and were assisted by numerous members of Ogier's secretarial team, however, no fees have been charged for Ogier's secretarial team's labour). The Ogier team worked very late into the evening on 8 and 9 November 2023 (completing the task at 11pm on Thursday, 9 November 2023) having*

*worked a total of 102.5 hours. Annex 1 page 3 lists the fees charged by Ogier to the Fourth Defendant in relation to this task.*

10. *It is indisputable that bundle D (in particular, bundle D1) suffered from various defects ....*
11. *As explained in Our First Email, "...a team of 10 associates, articled clerks, paralegals and secretaries from Ogier and Walkers have spent most of the day today [8 November 2023] and will probably need most of tomorrow [9 November 2023] to ensure the Hard Copy Bundles are usable for the witnesses in cross examination".*
12. *The additions resulting from items 10(i) to (vi) above necessitated a supplemental bundle for overspill (where documents did not fit into the bundle prepared by London Legal), namely D1-S, being prepared by both the Walkers and Ogier teams. Bundle D1-S is 10 volumes in total and it contains handwritten numbered dividers.*
13. *We hope that the above contextualises the very significant task of preparing the Hard Copy Bundles and rectifying bundle D and the urgent timescale involved, so that it could be of assistance to your client's witnesses as per your client's late request when called to give evidence at trial.*

#### *Conclusion*

14. *In light of His Lordship's confirmation that "...the plaintiffs remain under an obligation under the original order to provide hard copies. That is certainly not a provision that I was asked to amend nor did I amend it" we trust that further correspondence regarding the costs of the Hard Copy Bundles can be avoided.*
15. *Total costs of US\$186,575.51 have been incurred by our firm (US\$128,005.49) and Ogier (US\$58,570.02). Pursuant to the parties' agreement, Fund IV and GHF each bear only 15% of the total costs (US\$27,986.33 each) while Mr Jafar bears the remaining 70% (US\$130,602.85). This means that, setting off their 15% shares of those costs, of what our firm has incurred we are owed US\$100,019.16 by your client, and what Ogier has incurred they are owed US\$30,583.69 by your client. We therefore invite you to confirm that:*
  - (i) *your client will pay US\$100,019.16 to our firm's account (details of which are enclosed at annex 3), by no later than 12 noon, Monday 18 December 2023; and*
  - (ii) *your client will pay US\$30,583.69 to Ogier's account (details of which are also enclosed at annex 3) by no later than 12 noon, Monday 18 December 2023.*

*....."*



15. On 13 December 2023 Forbes Hares responded as follows (underlining added):

*“Our client is willing to pay the amount requested of him in your letter in respect of the disbursement costs. As for the fee earner time, we do take issue with the reasonableness of the 315.2 hours of fee earner time that is being sought. We would estimate that in normal circumstances, two and a half weeks would be ample time for one fee earner working full time with some secretarial assistance to get a trial bundle that to a large extent had already been printed in October updated to 10 November 2023 (the date the witness testimony commenced). Two and a half weeks of full time work might equate to approximately 100 hours of billable fee earner time.*

*We do, however, accept that the fee earner time involved was necessarily greater than this because the bundle had to be updated in a very short time. Our client is grateful to Walkers and Ogier for accomplishing the task in only 2 days on 8 and 9 November. He made use of the hard copy bundle in the witness box as did some other witnesses including the Defendants’ expert, M Cohen.*

*As the bundle had to be brought up to date in only two days we would propose that an additional 60 hours be added to the 100 hours estimated above. 160 hours would equate to 8 fee earners each working two 10 hour days.*

*Accordingly, a reasonable figure for the fee earner time would be  $160/315.2$  x the total amount claimed for fee earner time in your letter. Applying  $160/315.2$  to the Walkers and Ogier time costs claimed in your letter results in those time costs being USD 45,037.30 and USD 28,865.95 respectively with the total costs accordingly being as follows:*

*Walkers’ total disbursements: USD 39,282.01*

*Walkers’ total time costs: USD 45,037.30*

*Ogier’s total disbursements: USD 1,704.09*

*Ogier’s total time costs: USD 28,865.95*

*Total: USD 114,889.35*

*Applying the 70/15/15 split previously agreed, our client’s liability would be USD 80,422.55 and that of Walkers and Ogier’s clients would be USD 17,233.40 each.*

*The result is that our client would pay USD 67,085.91 to Walkers’ account and USD 13,336.64 to Ogier’s account in respect of his share of the costs of the witness trial bundle. We hope that this can be agreed in order to draw a line under the matter subject to any future costs taxation. Such an agreement would be without prejudice to any position that any party may wish to take on a future costs’ taxation as to the reasonableness of the costs involved in the production of the hard copy bundle for the use of the witnesses and the amount that should be allowed on any such taxation. So, should your or Ogier’s clients be successful and obtain a costs order in their favour the agreement proposed in this email would not preclude the Defendants from contending that a greater amount should be allowed on taxation.”*

16. On 19 December the Fund Parties responded with a revised proposal (the **Discounted Proposal**):

“8. Without prejudice to the fact that the time costs have been reasonably incurred by the Fund Parties, in order to draw this debate to a close, the Fund Parties are willing to absorb 30% of the time costs (the "Discounted Proposal"), with Mr Jafar being liable to pay 70% of the Fund Parties' time costs and 100% of the Fund Parties' disbursements, subject to the Costs Agreement, as follows:

<i>Description</i>	<i>Total Cost</i>	<i>Discounted Proposal</i>
<i>Disbursements for Walkers</i>	<i>US\$39,282.01</i>	<i>US\$39,282.01</i>
<i>Disbursements Ogier</i>	<i>US\$1,704.09</i>	<i>US\$1,704.09</i>
<i>Walkers' Time Costs</i>	<i>US\$88,723.48</i>	<i>US\$62,106.44</i>
<i>Ogier's Time Costs</i>	<i>US\$56,865.93</i>	<i>US\$39,806.15</i>
<i>TOTAL</i>	<i>US\$186,575.51</i>	<i>US\$142,898.69</i>

9. Pursuant to the Costs Agreement, the parties' respective shares of the Discounted Proposal cost are as follows:

(i) Mr Jafar: US\$100,029.08 (i.e. 70%)

(ii) Fund IV: US\$21,434.80 (i.e. 15%)

(iii) GHF Parties: US\$21,434.80 (i.e. 15%)

10. For the avoidance of doubt, the Discounted Proposal regarding the Hard Copy Bundle cost does not seek to alter the usual taxation of costs, following the close of the trial of the Related Proceedings.

11. In conclusion, off-setting the Fund Parties' 15% respective shares of the Discounted Proposal cost will result in your client meeting US\$79,953.64 of Walkers' costs and US\$20,075.44 of Ogier's costs. We therefore invite you to confirm that Mr Jafar will pay:

(i) US\$79,953.64 to our firm's account; and [corrected: US\$79,172.72]

(ii) US\$20,075.44 to Ogier's account, [corrected: US\$20,213.25]

by no later than close of business on Friday 22 December 2023.”

17. In February 2024, Forbes Hare requested a breakdown of the fee-earner and non-fee-earner time costs incurred on a daily basis in preparing the hard copy bundle. This was provided on 15 February 2024.
18. On 22 February 2024, Forbes Hare's letter to Walkers was in the following terms (underlining added):

*“... our client offered to pay your clients USD80,422.55 in respect of the Hard Copy Bundle costs by our email of 13 December 2023. The Fund Parties rejected that generous offer. The position, therefore, is that our client made a generous proposal to resolve this issue some ten weeks ago. The reason why this matter rumbles on is entirely the fault of the Fund Parties, and their on-going attempt to offload their extravagant costs on our client.*

*... Your sensitivity to costs scrutiny is notable. However, the fact that the parties are not involved in a taxation procedure does not mean that our client should ignore the obvious excesses of the Fund Parties' costs claim.*

*The issue between the parties is what (if any) amount our client should pay – effectively on account – in respect of the Fund Parties' costs of preparing the Hard Copy Bundles.*

*Although no formal application was made to amend the Order of 18 August 2022, prior to the trial all the parties agreed to dispense with the obligation on the plaintiffs to produce a hard copy bundle for use at trial. All parties therefore commenced the trial on the understanding that hard copy bundles would not be provided by our client.*

*On 5 November 2023 (Z1118.1) we wrote to you to propose that, in order to assist the parties' witnesses, the parties should only prepare hard copies of the documents that they intended to put to witnesses in cross-examination. This proposal would have allowed for short, specific hard copy bundles to be prepared for each witness's cross-examination at the appropriate juncture and at minimal cost. Such documents would, of course, have represented just a tiny fraction of the totality of the documents in the trial bundle.*

*You and Ogier rejected that proposal by emails later the same day (Z1118.2), albeit not pointing to any prejudice that would have resulted from the preparation of discrete hard copy bundles to expedite the process of cross-examination. Rather, you objected on the basis that the parties had previously agreed to use electronic bundles.*

*[The letter then summarises the chronology from day 2 to day 4 of the trial]*

*The chronology set out above exposes the falsity of the invective in your letter:*

- 1. First, contrary to the claim in paragraph 8(iii) of your letter, our client did*

not “insist[ ] on using printed bundles at trial”. Our client’s consistent position was that only those documents which would be put to witnesses in cross-examination should be produced in hard copy. It was the Fund Parties who insisted on producing and bringing to Court an entire hard copy of the trial bundle, and then unilaterally updated everything in it, rather than simply producing hard copies of the tiny fraction of those documents that were actually deployed in cross-examination.

2. Second, it is disingenuous for you to complain that our client “failed” to produce the hard copy bundles himself (paragraph 8(ii) of your letter). As Mr Atherton repeatedly accepted, the parties had agreed to dispense with a hard copy bundle at trial. Our client’s subsequent proposal – that hard copies of just the documents that would be put to witnesses in cross-examination should be made available – did not alter that agreement.
3. Third, your letter claims that the Fund Parties’ legal teams – including many highly experienced (and expensive) attorneys – spent no less than 327.1 hours working on the hard copy bundles, in addition to time spent by Walkers’ non-fee earner staff. That is a staggering amount of time for a straight-forward exercise, and it beggars belief that the exercise of simply adding hard copies of documents to be put to our client (or, indeed, any of the other witnesses) can possibly have taken anything like that much time or required the involvement of expensive senior attorneys. No detail is provided in your letter of how the time spent by Walkers and Ogier fee-earners is said to relate to that exercise (as opposed, for example, to updating the bundles to include the numerous documents added to the bundle by the GHF Parties in support of their hopeless ‘autonomy’ case, or updating the bundles to include hard copies of documents – such as correspondence – which were highly unlikely to be put to any of the witnesses in cross-examination).

Our client does not seek to renege on his previous agreement, communicated to you in Forbes Hare’s email of 9 November 2023, to bear 70% of the “reasonable disbursement and attorney costs of producing the hard copy set” (emphasis added).

However, it is neither proper nor fair for our client to be forced to subsidise the Fund Parties’ ill-judged and unnecessary decision to produce (and update) an entire hard copy of the trial bundle. It is equally neither fair nor proper for our client to subsidise costs which are, on any view, unreasonable and disproportionate. Our client noted with concern the very large number of attorneys (onshore and offshore) that the Fund Parties mobilised for trial, and he is therefore astute to avoiding the injustice of opportunistic demands to fund their extravagance.

The fair and appropriate course is that he should pay only those costs which relate to the exercise of producing hard copies of the documents that were put to him in cross-examination (and to his other witnesses, to the extent that such hard copies were put at all). Those costs would represent only a nominal amount of the

*extravagant disbursements and attorney time costs incurred by the Fund Parties in producing and updating the entire hard copy trial bundle.*

*Nonetheless, our client is mindful of Justice Segal's request that the parties try to reach agreement on this issue, and he does not wish to be drawn into yet another satellite dispute relating to the Fund Parties' legal costs. Accordingly, our client is prepared to make a payment of US\$40,377. That figure represents:*

1. *70% of the Fund Parties' disbursements incurred in producing the hard copy bundles (being USD27,497); together with*
2. *70% of the equivalent of 40 hours – or one full working week – by a Walkers junior associate at the rate of \$460/hour cited in Annex 1 of your letter (being USD12,880). Our client considers that a full working week should have been more than sufficient for a suitably qualified associate to ensure that those bundles which needed to be maintained in Court in hard copy were kept up to date.*

*Please confirm your clients' agreement to this proposal.”*

19. On 1 March 2024 Walkers wrote to Forbes Hare that the Fund Parties considered that the Plaintiff's attitude was unreasonable and would be applying to the Court for a suitable order.

### **Discussions and decision**

20. The first question relates to the jurisdiction that the Fund Parties are asking the Court to exercise. While this has not been challenged by the Plaintiff it is important to be clear as to the basis on which an order on the Application is to be made.
21. The Fund Parties are not seeking a determination under GCR O.62 as to the liability of the parties for the hard copy bundles costs and, of course, there is no jurisdiction to make an order for the payment of costs on account under GCR O.62, r.4(7)(h) since there has been no order for the Plaintiff as the paying party to pay costs subject to taxation. It seems to me that in substance the Fund Parties are seeking an order as part of and consequential on the direction given at the trial that they prepare hard copy documents for the purpose of the Plaintiff's cross-examination (while no formal order was drawn up to that effect it can fairly be said that the Fund Parties acted in accordance with my requirement that they produce the requisite hard copies).

22. The Fund Parties, as I see it, submit that the proper and fair cost consequences of the direction should be that having been required at short notice and at least for the benefit of all parties and on their case to do work that should have been done by and at the expense of the Plaintiff, they should be immediately reimbursed for a substantial part of the expenses incurred and not left out of pocket until formal costs orders are made at the conclusion of the proceedings. They say that the Court envisaged, at the time that the direction was given, that there would be cost sharing and that the order they now seek is in accordance with the Court's indications (and it could have been made a condition of the direction that the Plaintiff pay a relevant share of the costs). The Fund Parties also say that the Court should take into account (I do not think that they seek to enforce) the Costs Sharing Agreement and the agreement made and acknowledgements given by the Plaintiff thereunder and in connection therewith.
23. The next question relates to whether the Plaintiff should be required to make a payment at this stage, and if so, how much.
24. I have carefully read the parties' correspondence. I do not propose to and am not in a position to engage in formal fact finding. But I have to say that it reveals a sorry situation. A huge amount of costs have been incurred with a vast volume of work having to be done in a limited period under great time pressure and therefore pursuant to a process that required many more people than would have been needed had the exercise been done well in advance of the hearing and planned in advance. I also have to say that I regard the Plaintiff as primarily although not exclusively to blame. The issue of what documents his witnesses would need to see and the form in which they would wish to see them should have been discussed and agreed well in advance of the hearing. If the Plaintiff's counsel and attorneys considered that the Plaintiff needed to have hard copy documents available they should have raised this with the Fund Parties' counsel and attorneys well in advance of the hearing and ensured that satisfactory arrangements were in place. They did not do so. This was particularly important where the discussions concerning complete reliance on e-copies were not recorded in an amendment to the Directions Order previously made (so that the Plaintiff remained as regards the Court's directions responsible for preparing a hard copy bundle). It also appears from the correspondence that the Plaintiff's attorneys knew by 9 November

2023 that the copying exercise would be on a large scale (see the email from Forbes Hare of that quoted above regarding whether Forbes Hare accept that the production of the entire hard copy bundle was necessary) and it was open to them at that stage to have imposed an upper financial limit on the sum that the Plaintiff agreed to pay. They did not do so.

25. I can see that the Plaintiff's concerns about and objections to paying the substantial sums demanded by the Fund Parties are not entirely unreasonable. I can see that he has raised some entirely proper questions (for example, about the extent to which the Fund Parties are seeking to recover sums for time spent before 7 November 2023 and as to whether all those involved were really needed). However, his change of position was not helpful. On 13 December 2023 the Plaintiff (via Forbes Hare) indicated that he was willing to pay USD\$67,085.91 to Walkers' account and US\$13,336.64 to Ogier's account. His retreat from that position appears not to have been properly explained and it is hard to see that it made commercial sense to prolong the dispute and incur further costs for relatively small sums.
26. In the circumstances, it seems to me that: (a) the Plaintiff should make a payment now of some of the Fund Parties' costs to reflect the basis on which the Fund Parties were directed and required by me to prepare hard copy documents and to ensure that they are partly reimbursed pending the making of a costs order at the conclusion of the proceedings; and (b) that the Discounted Proposal provides a fair basis for determining the amount that the Plaintiff should pay. The Discounted Proposal (as corrected on 15 February 2024) involved the Plaintiff paying US\$79,172.72 of Walkers' costs and US\$20,213.25 of Ogier's costs and in my view these are the amounts that he should pay. This part of the Application is therefore granted.
27. It seems to me that in these circumstances the Fund Parties should have their costs to be taxed on the standard basis if not agreed of the Application.
28. However, I do not consider it appropriate to go further and make the orders sought by the Fund Parties in relation to their pre-issue costs of dealing with this dispute. The Fund Parties seek an order that the Plaintiff also pay their costs in dealing with this dispute since 11 December 2023. While there is jurisdiction to make an order for costs

incurred before the Fund Parties' Application was issued, and I have considered whether to make an order for their costs incurred since the Discounted Proposal was made on 19 December 2023, I have decided that it would not be appropriate to do so (save for any costs of and occasioned by the Application).

29. I will ask Walkers to prepare and agree with Forbes Hare an amended version of the draft order they filed with the 1 March Letter. Paragraphs 1 and 4 of that draft order need to be deleted and a new paragraph added to reflect the costs order referred to in paragraphs 26 and 27 above. In addition, wording will need to be added to state and make it clear that the order is ancillary to the direction made at the trial and is not an order determining any liability with respect to the costs of the trial which shall be determined by the Court in the normal way after judgment has been handed down and is therefore without prejudice to the Fund Parties' rights to seek, as part of the determination and quantification of those costs, a further payment in respect of the hard copy hearing bundle costs and for the Plaintiff similarly to seek the reimbursement of all or part of the sums so paid. I will also leave it to the attorneys to review and seek to agree the recitals in light of this judgment.



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**The Hon. Mr Justice Segal**  
**Judge of the Grand Court, Cayman Islands**  
**21 May 2024**